



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 31, 1994

Mr. Herbert L. Prouty  
General Counsel  
El Paso Water Utilities Public Service Board  
P.O. Box 511  
El Paso, Texas 79961-0001

OR94-052

Dear Mr. Prouty:

You request an open records determination under the Texas Open Records Act (the "act"), chapter 552 of the Government Code (former article 6252-17a, V.T.C.S.).<sup>1</sup> We have assigned your request ID# 23614 (formerly ID# 19810).

You advise us that the El Paso Water Utilities Public Service Board (the "board") has received two requests for information relating to a contract dispute between the board and the requestor's client, who has entered into a contract to build a water treatment facility for the board. In the first request, dated July 27, 1992, the requestor sought 19 categories of information relating to the water treatment facility project, including documents relating to the following subject matter:

1. The name of the bond issue providing the financing for the project.
2. Specific dollar amounts allocated to the project and other projects in the bond issue.
3. Any allocation of funds, formally or informally, within the PSB to the project.
4. The amount remaining in the construction fund for this bond issue allocated to the project.

---

<sup>1</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

5. Amounts remaining in the construction fund for this bond issue for each other project financed by this bond issue.
6. Funds available for the completion of construction of the project including the amount of any contingency fund for claims or changes.
7. Correspondence between PSB and PSC relating to the design of the project and the administration of the contract.
8. The selection of the designer for the project.
9. The selection of pre-qualified equipment suppliers for the project.
10. The schedule for the design, bidding, award, construction, and placing into service of the Jonathan Rogers Water Treatment Plant including all changes to that schedule.
11. The planned and actual completion dates of the contract for the pipeline between the Jonathan Rogers Water Treatment Plant and the PSB system.
12. The planning and implementation of hiring personnel to operate and maintain the Jonathan Rogers Water Treatment Plant.
13. The seepage of water out of the holding ponds at the project and any plans to modify the ponds to reduce seepage.
14. The selection of Henkel-Emery ("Henkel") as the ozonation subcontractor on the project.
15. Prior dealings with Henkel on other contracts.
16. The redesign of portions of the project to accommodate Henkel equipment.
17. Delays to the project.
18. Conflict, lack of detail, or other deficiencies in the plans and specifications for the project.
19. Project management by Healy.

You advise us that some of the requested information has been made available to the requestor. By letter dated July 31, 1992, however, you sought clarification from the requestor with respect to categories 1, 2, 3, 5, 8, 12, 15, and 19.<sup>2</sup> By a letter dated August 6, 1992, the requestor provided the requested clarification for categories 1, 2, 3, 5, 8, 12, 15, and 19. You advise us that the "negotiations and the response continued through September 1992" and, as a result of the negotiations, over 3,000 pages of documents have been copied and provided to the requestor.

You advise us that, during the course of the negotiations, the requestor sought access to documents generated after July 27, 1992, the date of the first request. Relying on Attorney General Opinion JM-48 (1983) and Open Records Decision Nos. 476, 465 (1987) and 452 (1986), in which this office held that the act does not obligate a governmental body to provide access to information that does not exist at the time of the request, you informed the requestor that you would not provide access to information generated after October 1, 1992.<sup>3</sup> In response to your assertion regarding the scope of the first request, the requestor submitted a second request for information on April 1, 1993. In the second request, the requestor sought documents relating to the same categories of information included in the first request that were generated between July 27, 1992, and April 2, 1993, and four new categories of information. By letter dated April 13, 1993, you sought clarification from the requestor with respect to the four new categories. On the same day you submitted to this office a request for an open records decision pursuant to section 552.301(a) with respect to both requests. Finally, on August 12, 1993, you made thirteen documents subject to the first request available to the requestor and, in a letter of the same date, withdrew your request for an opinion regarding the released documents.<sup>4</sup>

Section 552.301(a) of the Government Code provides:

A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C

---

<sup>2</sup>While a governmental body is obligated to make a *good faith* effort to relate a request to information which it holds, Open Records Decision No. 561 (1990) at 8, it should, when it is presented with an unclear request for information, advise the requestor of the types of information available so that he may clarify his request. *Id.* at 9.

<sup>3</sup>You reasoned that, "[a]lthough the original request was in July of 1992, since negotiations and correspondence between the parties continued through September 1992, . . . it was only fair to provide [the requestor] with copies of documents through September 30, 1992."

<sup>4</sup>In addition, you advise us that 4 of these 13 documents had previously been made available to the requestor, but "with the opinions and advice portions deleted in accordance with previous Open Records Opinions interpreting section [552.111]."

must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day of receiving the written request.

Section 552.302 provides:

If a governmental body does not request an attorney general decision as provided by section 552.301(a), the information requested in writing is presumed to be public information.

Once a governmental body receives a written request for information and there has been no previous determination that it falls within an exception to required public disclosure, the act requires a governmental body to release the requested information or to request a decision from the attorney general within ten days. *See, e.g.,* Open Records Decision Nos. 563, 561 (1990) at 8-9; 304 (1982); 87 (1975); 31, 23 (1974). You received the first request for information dated July 27, 1992, on July 28, 1992. The requestor clarified the request in a letter dated August 6, 1992, and provided additional clarification through September 30, 1992. You requested a determination of this office by letter dated April 13, 1993. On the basis of these facts, we conclude that with respect to the request received on July 28, 1992, you failed to request a decision within the ten days required by section 552.301(a) of the Government Code.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Normally, the presumption of openness can be overcome only by a compelling demonstration that the information should not be released to the public, *i.e.*, that the information is deemed confidential by some other source of law or that third party interests are at stake. Open Records Decision No. 150 (1977). You claim that the information requested in the first request is protected by sections 552.101, 552.103(a), 552.107, and 552.111 of the act.<sup>5</sup> We find that you have

---

<sup>5</sup>You also claim that two of the requested documents, specifically, a handwritten note written by a former board general manager and a document that apparently originated from a board contractor's personnel file (Exhibit "G"), are not subject to the act, because they do not contain "information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business." Section 552.021 provides:

(a) Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

not made a compelling demonstration sufficient to overcome the heightened presumption of openness arising from your failure to timely request a decision of this office.<sup>6</sup> Accordingly, the information requested in the first request must be released in its entirety.

You claim that the information requested in the second request is excepted from required public disclosure by sections 552.101, 552.103, 552.107, and 552.111 of the act.<sup>7</sup> To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990). In this instance you have made the requisite showing that the requested information relates to reasonably anticipated litigation for purposes of section 552.103(a). The information requested in the second request may therefore be withheld.<sup>8</sup>

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records,

---

(Footnote continued)

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.021. The documents contained in Exhibit "G" were clearly created "in connection with the transaction of official business," *i.e.*, in the course of the board's transactions with its contractors. Although the document originating from the board contractor's personnel file might not be subject to the act when maintained solely by the contractor, it is certainly a public record when in the possession of the board and therefore a public record of a governmental body. Accordingly, we conclude that the documents contained in Exhibit "G" are public records subject to the act.

<sup>6</sup>You assert section 552.101 in conjunction with the attorney work product doctrine and various discovery privileges. Section 552.101, however, does not encompass the attorney work product doctrine or discovery privileges. *See* Open Records Decision No. 575 (1990).

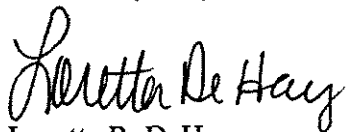
<sup>7</sup>We understand that you have already provided to the requestor certain documents created between July 27 and September 30, 1992; we therefore do not consider the applicability of any of the exceptions you raise under the second request to these documents. *See* Gov't Code § 552.007; Open Records Decision No. 490 (1988) (concluding that once a governmental body releases public information to one person, the act's exceptions to disclosure are waived unless the information is deemed confidential by law).

<sup>8</sup>Because we have concluded that you may withhold the documents that were the subject of the second request pursuant to section 552.103, we do not address your arguments under sections 552.101, 552.107, and 552.111 in this ruling.

there would be no justification for now withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/GCK/rho

Ref.: ID# 23614, ID# 23615  
ID# 23616, ID# 23617  
ID# 23618, ID# 23619  
ID# 23620

Enclosures: Submitted documents

cc: Mr. William J. Derrick  
Kemp, Smith, Duncan & Hammond, P.C.  
P.O. Drawer 2800  
El Paso, Texas 79999-2800  
(w/o enclosures)